Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
1998 Biennial Regulatory Review	)	MM Docket No. 98-35
of Commission's Broadcast	)	
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202	)	
of the Telecommunications Act	)	
of 1996.	)	

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COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC") files these comments in response to the Commission's Notice of Inquiry ("NOI") in the above-referenced Docket.

I. INTRODUCTION AND SUMMARY

Congress directed the FCC in the 1996 Telecommunications Act to review all of its ownership rules biennially and to "determine whether any of such rules are necessary in the public interest as the result of competition."[1] The Commission was further directed to repeal or modify any regulation it determines to be no longer in the public interest.[2] The text of the 1996 Act makes it clear

[1]Telecommunications Act of 1996, Section 202(h), 47 U.S.C. §161(a).

[2]Ibid.

that the Commission's review is to include not only the ownership rules that predated the 1996 Act, but also the ownership rule changes adopted pursuant to specific directions in the 1996 Act itself.[3]

This proceeding provides the Commission with a prime opportunity to conform its rules to the reality of today's video marketplace. NBC has previously urged the FCC to acknowledge the tidal wave of changes in technologies that has created a sea change in the local video market by relaxing the television duopoly rule.[4] NBC now urges the Commission to focus on the need to eliminate two other ownership restrictions - the TV national ownership limitation and the rule prohibiting local cable/TV station cross-ownership.[5]

Since the Commission last reexamined these rules, there has been tremendous growth in the number of competing national and local video programming sources available to consumers.[6]

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[3]Ibid.

[4]Comments filed February 7, 1997 in MM Docket No. 91-221.

[5]Sections 73.3555(e) and 76.501(a), respectively.

[6]The national TV ownership limit was changed without substantive discussion in 1996 in accordance with a directive to the Commission included in the 1996 Telecommunications Act. Implementation of 1996 Telecommunications Act, 11 FCC Rcd 12374 (1996). The national TV limit was last substantively considered by the Commission, however, in a proceeding concluded in 1985, Amendment of Multiple Ownership Rules, 100 FCC 2d 17 (1984), modified on reconsideration, 57 RR 2d 966 (1985). The TV/cable

Viewership of cable and DBS channels has increased and the viewing shares of local television stations and national television networks has steadily declined. Competition for the local and national advertising dollars that are the sole revenue source for television broadcast stations and networks has also increased greatly.

Notwithstanding these increased levels of competition, television station owners continue to be prevented by regulation from realizing the efficiencies and economies of scale achievable through increased national ownership of stations. Television broadcasters and cable operators are also prevented from achieving similar economies and efficiencies through combinations on the local level. Yet at the same time, there are no similar restrictions on the number of cable channels or DBS channels a single entity may own or control, either nationally or locally, nor are there national ownership restrictions on other competing media such as newspapers and radio stations.

The time has now come to end the Commission's asymmetric approach to ownership regulation. Because they are no longer necessary to prevent harm to competition or diversity, the

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cross-ownership rule was last modified in 1975, Amendment of Part 76, Subpart J of the Commission's Rules, 55 FCC 2d 540 (1975), reconsideration denied, 58 FCC 2d 596 (1976). For many years prior to 1996, the cable/TV cross-ownership prohibition was also statutory. The statutory proscription was eliminated as part of the 1996 Telecommunications Act.

present 35% national audience reach limit on national television ownership and the total prohibition of local cable/television cross-ownership are no longer supportable. As we shall show, elimination of those rules will have no material effect on the diversity of programming voices available either nationally or locally, nor will it enable any single owner to exercise market power in any video programming distribution or advertising market. Both restrictions should therefore be repealed.

II. THE STEADILY EXPANDING VIDEO MARKETPLACE HAS RESULTED IN TREMENDOUS GROWTH BOTH IN COMPETITION AND IN VIDEO PROGRAM DIVERSITY.

The continuing expansion of the video marketplace has created exponential growth in the number of diverse video services available to consumers and has decreased both the national and local viewing shares achieved by any single broadcast owner. This growth has also (a) increased the number of entities competing for national and local advertising revenues (b) decreased the share of advertising revenues achieved by any single entity and (c) increased the number of entities producing programming and competing to buy programming produced by others. A brief overview of the present competitive landscape shows that this new level of heightened competition is still continuing to increase rapidly.

A. Cable Subscribership and Cable's Share of Total Television Viewing Continues to Rise Steadily.

In its most recent annual report to Congress on the status of competition in the markets for delivery of video programming, the Commission found that since its prior report:

> the cable industry has grown in several ways including subscribership, homes passed, penetration, premium subscriptions, viewership, and channel capacity. In addition, during all of 1996 and the first half of 1997, the industry began to expand its service offerings to customers in certain areas to include digital video service, cable modems, and video telephony.[7]

Cable systems today pass more than 97% of U.S. television households, and actual cable subscribership now exceeds 68% of all homes passed by cable lines.[8] The number of homes subscribing to premium cable services has increased 5% each year for the past five years. [9] Cable channel capacity has also expanded: 60% of all cable subscribers are now served by systems with a capacity of at least 54 channels, and 90% of all subscribers are served by systems with a minimum of 30

[7] Fourth Annual Report in CS Docket No. 97-141, In the Matter of Assessment of the Status of Competition in Markets for the Delivery of Video Programming, released January 13, 1998, FCC-423 ("Fourth Annual Report"), ¶ 13 (footnote omitted).

[8] Id., ¶ 15.

[9] Ibid.

channels.[10]

The number of cable networks continues to grow, with the number of basic networks having increased from 104 to 126 between 1995 and 1996.[11] Forty percent of national cable programming services are vertically integrated with cable system owners.[12] Indeed, 50% of newly launched services have been vertically integrated.[13]

During the 1996-1997 viewing season, viewership of cable channels grew to a 36% share of viewing hours, while viewership of television broadcast stations fell to a 66% share.[14] And for the first time ever, the viewing share achieved by basic cable in prime time was recently reported as having exceeded the combined prime time viewing share of the four major broadcast television networks.[15] The share of consumer attention gained by cable will in the future be further enhanced as cable operators begin to

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[10] Id., ¶¶ 16-17.

[11] Id., ¶ 17.

[12] Id., ¶ 158.

[13] Id., ¶ 163.

[14] Fourth Annual Report, ¶19. Percentage totals exceed 100% owing to multiset households.

[15] Electronic Media, July 6, 1998, at 22.

provide digital video, data and voice services over their systems.[16]

B. Direct Broadcast Satellite Systems Now Provide Up to 200 Channels of Diverse Video Programming To Steadily Increasing Numbers of Viewers.

As the Commission has recognized, DBS services offer many features highly valued by consumers, including digital picture quality, compact disk quality sound clarity, increased channel capacity, near video on demand movies and other interactive programming and data services.[17] As of June 1997, the four DBS providers furnished programming to nearly 5.1 million subscribers, an increase of more than 2.2 million over a one year period.[18] According to the SBCA, DBS subscribership had expanded to 9.1 million homes by June 1998 and was expected to reach 10 million homes by year end.[19] Present technology permits DBS operators to offer as many as 225 different channels to

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[16] Fourth Annual Report, supra, ¶¶ 45-46. The announced plan to merge TCI and AT&T should accelerate this trend.

[17] Id., ¶ 56.

[18] Id., ¶ 55.

[19] Communications Daily, June 17, 1998, at 5.

subscribers.[20]

C. "Wireless Cable" Provides an Additional Source of Competing Video Services.

By June 1997, 1.1 million homes subscribed to MMDS systems offering up to 33 channels of service.[21] With the introduction of digital technology, the number of channels MMDS systems will be able to offer will increase very substantially and wireless cable systems will soon also be able to offer interactive data services. By June 1997, 1.16 million U.S. homes also subscribed to SMATV systems, another form of wireless cable. SMATV systems provide both local TV stations and numerous channels of satellite-delivered program services to their subscribers.[22]

D. Competition Among Off-Air Television Stations and Among Television Networks Has Also Burgeoned.

Only three national television networks existed during most of the years since the Commission's national TV ownership limits were adopted. The number of networks has now doubled to six, with a seventh network, PaxNet, scheduled to begin operation this fall. The number of television stations has also grown, having

[20] Fourth Annual Report, ¶ 65.

[21] Id., ¶ 55.

[22] Id., ¶ 84.

reached 1,579 as of May 31, 1998,[23] a number that will double over the next four years as each existing station puts into operation a new digital service. Indeed, many of the new digital stations may themselves offer multiple channels of service.

The steady decline in the total audience share of off-air stations coupled with the rise in the number of operating stations has resulted in an even more rapid decline in the audience shares of individual stations. Individual station shares will inevitably decline further as new digital stations commence operation and as the number of new non-broadcast services continues to increase. Conversely, these developments will create a steady increase in the diversity of television programs available to the public.

E. "Convergence" Is Creating a Potentially Infinite Number of Local and National Information Outlets.

Dramatic and accelerating technological advances are rapidly turning television receivers into computers and computers into television receivers. Enhanced service offerings such as WebTV already permit viewers to supplement their favorite news, sports and entertainment programs with a wealth of related information

[23] FCC News Release No. 83989, June 19, 1998. Of this number 1,211 were commercial stations. In addition to the 1,579 full-service television stations in operation, the Commission's release also reports 2,089 LPTV stations and 7,935 television translator stations.

simply by clicking on Web links. The viewer can thus access a variety of "diverse voices" at the same time.

The Internet itself, standing alone, offers an almost infinite range of information sources and is in addition the information superhighway equivalent of a "town square" in which matters of local and national concern and diverse points of view are freely aired and shared. Services such as "Sidewalk" and "Digital City" enable the Internet user to access her local news, retailers, services, apartments, job listings and more. As a result, the Internet is becoming a major alternative source of diverse programming in the local marketplace.

III. THE NATIONAL LIMIT ON TELEVISION STATION OWNERSHIP SHOULD BE ELIMINATED.

A. The Number of Television Stations a Single Entity Owns Nationally Has No Impact on Diversity or Competition At the Local Level.

As shown above, the diversity of separate video programming sources available over the air or from multichannel video program distributors in virtually all television markets has continued to grow and is very large in every area of the United States. These separate programming sources provide both great local diversity of program voices and, as cable operators increasingly compete with television stations for local and national spot advertising to be inserted locally in basic cable services, also provide competition in the local advertising market.

The Commission has previously acknowledged that the local and national markets for delivered video programming and for advertising revenues are separate and distinct, and that local stations in one television market do not compete materially with stations in other television markets.[24] Given these circumstances, abolition of national television station ownership limits would have no effect on this existing high level of diversity and competition in local markets. That is because the number of separate station owners in each such market and the number of competitors in each market will remain the same with or without the present 35% national TV ownership cap.

B. National Television Programming and Advertising Markets are Unconcentrated and Will Remain So If The Present National Ownership Cap is Eliminated.

Even if television station advertising revenues and television station programming were deemed to be separate "markets" for purposes of analysis, those markets are unconcentrated and will remain so if the national ownership limit is repealed.[25] No single owner has or will have the ability to

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[24] An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-ownership Rules ("Economists Report"), which was prepared by Economists Incorporated and submitted with Comments filed May 17, 1995 by NBC and others in MM Docket No. 91-221, at Section VI.

[25] As NBC and many others have shown previously, the relevant markets should in fact be defined more broadly to include many

exercise market power in these national markets.

The Commission's own NOI recognizes this explicitly. Notwithstanding some consolidation in the television industry over the past several years, the Herfindahl-Hirschman Index ("HHI") with respect to national television station revenues[26] has risen only from 264 in 1996 to 308 in 1997.[27] That is far below the 1000 level at which a market is deemed to be even moderately concentrated and much farther below the 1800 level at which a market is termed moderately concentrated. Under merger guidelines employed by the Department of Justice, a merger or acquisition that does not result in an unconcentrated or moderately concentrated market becoming concentrated is presumptively lawful and is never presumed to be anticompetitive.[28]

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other information providers in addition to television stations. See Economists Report.

[26]An owner's share of national television station revenues is roughly correlated with the owner's share of national television station viewership.

[27]NOI, ¶ 15. As explained in the NOI, the HHI, a standard measure of competition used in antitrust analyses, is calculated by adding the squares of each market participant's percentage share of the relevant market. Under Department of Justice merger guidelines, a market is generally considered to be unconcentrated if the HHI is below 1000, and only moderately concentrated if the HHI is below 1800.

[28]U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992).

There is no realistic possibility that removal of the national ownership cap will cause even the narrowly defined television station market to become concentrated. As explained in the 1995 Economists Report (n.24, supra,), a television owners audience "reach" -- that is, the number of national television households reached by its stations, taken as a percentage of the number of households reached by all stations of all owners -- is relatively low. An owner whose stations served 25% of national households, for example, would have had (even in 1995) less than a 3% portion of the combined "reach" of all television stations nationally.[29] An increase in the coverage of the owner's stations to 100% of U.S. television homes would therefore have increased its 1995 percentage of the national reach of all television stations only to 12%, while its contribution to the national HHI would have increased from 9 to only 144 (the squares of each percentage share). As shown further in the Economists Report, even if every owner were permitted to acquire stations serving up to 100% of U.S. TV homes, and even if every major owner came as close to 100% coverage as possible given the number of stations that exist in each market, the HHI level would still not reach a "concentrated"

[29]Economists Report, supra, at 61. At the time of the Economists Report, there were only 1,033 commercial television stations. As of May 31, 1998, the Commission reported 1,211 such stations in operation. The 3% figure cited above would today be closer to 2%.

level.

To be sure, an owner's stations may achieve a percentage of national TV station viewership or national TV station revenue that exceeds its share of national audience "reach." In today's very competitive environment, however, differences in audience and revenue shares among competing owners are diminishing steadily. A large proportion of all television stations are owned by entities able to invest in attractive programming, and the former disparity between viewership of VHF and UHF stations is also greatly reduced. Indeed, the Commission found that a national HHI based on total television station revenues is still only 308, an extremely low figure.

Beyond HHI computations, it is also clear that removal of national ownership limits will advance, not impede, the development of new national program services. The four major television networks already have affiliated stations in almost all television markets of significant size, without regard to whether those affiliates are owned or not. Historically, the development of new national broadcast networks has occurred as more and more television markets acquired fifth, sixth and seventh stations available for affiliation. This continuing process of network development will not be affected adversely by elimination of the national ownership limits. To the contrary, removal of the national cap will provide further opportunities for developing networks to achieve vertical integration of their network operations and station ownership. That will, in turn, help assure developing networks of outlets for their programs and will thus promote the development of new nationally distributed program services.

C. Elimination of the National Ownership Cap Will Permit Broadcasters To Operate More Efficiently and to Better Serve the Public.

Group owned stations such as those operated by NBC tend to provide more news and public affairs programming than those that are individually owned. Such stations have greater economic resources and also realize the benefits of shared programming (including, for example, educational programming for children). Such stations also benefit greatly from the operational efficiencies of group ownership.

Group owned stations are able to share and reduce corporate overhead expenses, research departments, and the expenses of selling national spot advertising. Group owned stations are able to effect economies in purchasing capital equipment -- a matter of particular importance in the transition to DTV. Some programming costs can also be shared, and both personnel and equipment can be diverted from one location to another to cover special news events and natural disasters. The Commission has frequently cited such efficiencies and their public interest benefits on the local level in approving waivers of its one-to-a-market rule.[30] Similar efficiencies exist at the national level. Television broadcasters should now be permitted to realize their benefits to the same extent as is already the case for large newspaper and radio groups.

D. If Any National Ownership Cap is Retained, the UHF Discount Should be Eliminated.

Elimination of the national ownership cap would render moot the additional question raised in the NOI concerning the present 50% "UHF discount" used in computing the national reach of a television station owner. Should any ownership cap be retained, however, the UHF discount should be dropped.

As the NOI recognizes, the deficiencies in UHF reception that existed in the early years of television have largely been ameliorated by improved television receiver design and by the fact that more than two-thirds of all television homes now receive local signals via cable or SMATV systems. Moreover, a large majority of all television stations will operate on UHF frequencies under the Commission's new table of DTV allotments. Retention of the UHF discount serves no legitimate purpose under these circumstances. Accordingly, it should be eliminated as to all future station acquisitions.

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[30] See, for example, Pennino Broadcasting Corp., 9 CR 118 (1997), WHFS, Inc., 7 CR 843 (1997), Stockholders of Infinity Broadcasting Corp., 5 CR 1074 (1996).

IV. THE CABLE/BROADCAST CROSS-OWNERSHIP RULE SHOULD BE REPEALED.

In the 1996 Telecommunications Act, Congress eliminated the statutory proscription against common ownership of a television station and a cable system in the same market. With the vast growth of competing media in most markets and the availability of other rule provisions that preclude abuse of a common ownership position, the FCC should now follow the lead of Congress and remove its parallel regulatory restriction.

The FCC originally adopted the cable/TV cross-ownership rule in 1970. In doing so, the Commission reported concerns that a cable/television joint owner might favor its broadcast operation and operate its cable system less competitively by failing, for example, to offer "local origination" channels on cable.[31] The rules have also reflected apprehension at various times that a broadcaster-owned cable system might decline to carry other local broadcast stations or cable network channels in order to favor its own television station.

The existence and Supreme Court affirmance of the rules requiring carriage of local television stations have now essentially eliminated any station carriage concerns. And with respect to cable channels, both satellite-delivered and local, the rapidly increasing competition to cable from DBS providers,

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[31] CATV Rules, 23 FCC 2d 816 (1970).

MMDS, SMATV, and OVS systems now makes it effectively impossible for any cable operator to decline to offer popular program services.[32] The competitive concerns that provided a basis for the original rule are thus no longer a valid basis for continuing it.

On the other hand, the present rule discriminates unfairly against local broadcasters. At least until DTV broadcasts are generally receivable -- which will be a period of some years -- each television broadcaster is limited to the provision of a single channel in its market. That single channel is limited to the sale of advertising as its sole source of revenue. In contrast, cable operators may offer a multiplicity of channels, some supported by national and local advertising, some supported by subscriber fees, and some by a combination of the two. Moreover, cable operators such as TCI and Time-Warner couple this ability to offer multiple local channels with ownership interests in major cable networks such as CNN, HBO, WTBS, TNT, Cinemax, FX, Court TV, regional sports networks, and many others. Such vertical integration provides a strong competitive advantage by assuring such program services of cable carriage from the outset on commonly owned systems. This critical plus is not available

[32] The Commission's rules also prohibit a cable operator that owns a cable program service from denying that service to competing multiple video program distributors. See Part 76 of the Commission's Rules, Subparts O and Q.

today to broadcasters (such as NBC) when they seek to launch non-vertically integrated cable networks.

Allowing local common ownership of broadcast stations and cable systems will permit other entities to begin to realize the competitive advantages now enjoyed only by cable owners. It would also permit local broadcast stations and cable systems to share administrative, technical and other overhead expenses, thus making additional resources available for program investment and better service to the public. Absent any compelling reason to retain the present rule, broadcasters should, subject to all applicable antitrust constraints, be permitted to realize such efficiencies by acquiring cable systems in their stations' markets.

V. CONCLUSION

The national television ownership limitation and the cable/television local cross-ownership rule can no longer be justified either on diversity or competition grounds. Section 202(h) of the 1996 Telecommunications Act directs the Commission to "repeal or modify any regulation it determines to be no longer in the public interest." In accordance with this direction, the national television station ownership limit and the local TV/cable cross-ownership rule should each be eliminated.

Respectfully submitted,

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